IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1569 OF 2007
IN
SUIT NO.3467 OF 2005

WITH

NOTICE OF MOTION NO.4054 OF 2005
IN
SUIT NO.3467 OF 2005

Ramprakash B. Chandak ....Plaintiff
V/s.
Shyam B. Chandak & Ors. ....Defendants

Mr.Kamal Khata with Mr.Yogesh Adhia for the Plaintiff.

Mr.S.K. Chaurasia i/b Mr.Ashok Saraogi for the Defendants.

CORAM : S.J. VAZIFDAR, J.
DATED : 1ST OCTOBER, 2007.

P.C. :

1. By consent both the Notices of Motions are disposed of by this common order as the facts and questions that arises therein are the same.

2. The suit is filed for a declaration that the Defendants have no right, title and/or interest in the suit flat namely flat No.1502 in a building known as "Shuchi Heights", Mumbai and for possession thereof. The Plaintiff has also sought an injunction

restraining the Defendants from entering upon the suit flat and compensation/mesne profits for unlawful use and occupation of the said flat.

3. The Plaintiff and Defendant No.1 are brothers. Defendant No.2 is the wife of Defendant No.1. Defendant No.3 is their son.

4. The Plaintiff's case is that by two separate agreements both dated 2.7.2001, he acquired the suit flat and another flat being flat No.1501 in the said building for a consideration of Rs.22,00,000/- each and on the other terms and conditions mentioned therein. There is no dispute that the agreements were entered into only by the Plaintiff and not by any other member of the family including the Defendants.

5. The Plaintiff obtained a loan from IDBI Ltd. in the sum of Rs.44,00,000/- as is evident from the loan document dated 24.6.2002. The interest is fixed at 11% p.a. The loan is repayable in 180 monthly instalments with an EMI (equated monthly instalment) of Rs.48,021/-. The suit flats have been mortgaged by the Plaintiff in favour of the bank as security for due repayment of the said loan.

. There is no dispute that the Plaintiff had taken the loan in his personal capacity and not on behalf of or jointly with any other party or member of the family including the Defendants.

6. The Plaintiff’s case is that he acquired two flats in view of the serious physical ailments that he has been suffering from for over twenty years. Initially he was operated for spinal cord injury in 1984. As a result of certain unfortunate surgical complications, the Plaintiff became totally paralysed. He started recovering after extensive physiotherapy. He is now not completely recovered despite intensive medical treatment in India and abroad. Thereafter the Plaintiff suffered further medical complications. His bladder became neurologic. After extensive consultation with doctors in India and abroad, he was advised further surgery. He therefore had to be trained in self-catheterisation techniques to be performed every four hours.

7. Mr.Chaurasia, the learned counsel appearing on behalf of the Defendants did not deny these facts The Defendants do not deny the fact that the Plaintiff is not even able to walk and is confined to a wheel chair for the rest of his life.

8. On behalf of the Defendants, it was however, submitted that the Plaintiff's medical condition is totally irrelevant and ought not to be taken into consideration for the purpose of this suit. I agree that in deciding the rights of the parties the unfortunate medical problems being faced by the Plaintiff would not be relevant. If the Plaintiff is otherwise not entitled to the reliefs on a consideration of the facts and the law, he certainly cannot be granted the same merely because of his medical difficulties.

9. Nor did Mr.Khata, the learned counsel appearing on behalf of the Plaintiff, seek to derive any sympathy on this ground. He however justifiably relied upon these facts to establish the validity of the Plaintiff's contentions regarding the circumstances in and the purpose for which the suit flats were purchased by the Plaintiff for himself.

10. The Plaintiff's case is that he purchased the suit flat as he desired to have his residence and his office in the same premises. This is understandable as it would obviate the Plaintiff being required to travel for work. Further the Plaintiff also required

medical equipment to be brought in the premises. Considering the nature of the medical difficulties, only some of which I have mentioned, this is also understandable. There is nothing on record which makes me disbelieve the Plaintiff's case in this regard.

11. A letter of allotment was issued in favour of the Plaintiff alone. After the building was constructed and the society was formed, share certificates in respect of both the flats were issued in the sole name of the Plaintiff. Copies thereof have been annexed to the plaint.

12. After taking possession of the flats, the Plaintiff used one flat bearing No.1501 (not the suit flat) for his residence. He is a batchelor. He therefore requires help. There are atleast two attendants presently in the flat to assist him.

The Plaintiff installed in one room of the suit flat physiotherapy instruments. The other room was used as a bedroom. He used the hall as his office/study. The Plaintiff carries on business of importing packaging machinery.

13. The Plaintiff has three brothers namely Defendant No.1, one Vijay and one Omprakash.

. The said Vijay and Defendant No.1 resided in their own flats at Andheri. Vijay used to assist the Plaintiff in his business. After the Plaintiff moved to the suit flat, Vijay was also in search of a flat in the vicinity of the Plaintiff's flat. Vijay therefore, requested the Plaintiff to permit him to occupy one room in the suit flat till he acquired a suitable flat for himself after disposing of his flat at Andheri. The Plaintiff accordingly permitted Vijay to occupy one room in the suit flat.

. Similarly Defendant No.1 was also residing at Andheri. He too desired to acquire another flat. Defendant No.1 also requested the Plaintiff to accommodate him and Defendant Nos.2 and 3, his wife and son for temporarily till he found suitable accommodation after disposing of his flat. The Plaintiff accordingly permitted the Defendants to reside in one of the rooms in the suit flat.

. The Plaintiff however continued using the hall as his office and for storing his material.

14. The Plaintiff admittedly did not charge either of his brothers any compensation or rent for the use of the suit flat. Nor do either of the brothers repay the loan instalments.

15. The said Vijay subsequently acquired a flat in the same building. He therefore, vacated the room occupied by him in the suit flat. The Defendant thereafter started using both the rooms in the suit flat. The hall however continued to be used by the Plaintiff.

. Defendant No.1 had his own independent business of film production. He had nothing to do with the Plaintiff’s business.

16. There were disputes and differences between the Plaintiff and Defendant No.1 in respect of certain alleged loan transactions which I shall come to later. The Plaintiff therefore, requested Defendant No.1 to vacate the suit flat which the Defendants refused to do.

17. The Defendants filed a suit in the Bombay City Civil Court being Suit No.1571 of 2005 for a declaration that the Plaintiff has no interest in the

suit flat and for an injunction restraining him for disturbing their use, occupation and possession thereof.

. The suit was disposed of by an order dated 2.4.2005. A statement was made on behalf of the Plaintiff that he would not disturb the Defendants' possession without following due process of law. The suit and the Notice of Motion taken out therein were accordingly disposed of.

. It is in these circumstances that the above suit has been filed.

18. To reiterate and sum up therefore, it is admitted that the Plaintiff purchased both the flats. It is admitted that the agreements of sale, the letters of allotment and the share certificates are in his name. It is admitted that the Plaintiff obtained the loan for the purpose of acquiring the suit flats. It is admitted that it is the Plaintiff alone who is repaying the loan.

19. By an order dated 10.1.2006 in Notice of Motion No.5054 of 2005, the learned Judge refused the prayer of appointment of a Court Receiver stating that

the same could not be done at the ad-interim stage. The learned Judge granted an injunction restraining the Defendants from alienating, encumbering or creating any third party rights, title and/or interest in respect of the suit flat. The learned Judge directed the Defendants to make payment of all the outgoing charges as demanded by the society as well as electricity charges. There was some dispute in regard to payment of the outgoings which led to Notice of Motion No.1569 of 2007 being filed. It is not necessary however, to enter into those disputes at this stage.

20. The Defendants have also filed the written statement in addition to an affidavit in reply.

21. The main contention on behalf of the Defendants is that the Plaintiff and the Defendants had been part of the joint family and had been residing together ; that the business was being carried on generally between the Plaintiff and the Defendants and that the said two flats including the suit flats came to be purchased as joint family property between the Plaintiff and Defendant No.1 and that it was only for the sake of convenience that the same had been acquired in the name of the Plaintiff.

It is further contended that the consideration in respect of the flats had been paid jointly from the business carried on by the Plaintiff and Defendant No.1. It is also contended that the understanding was that the Plaintiff would occupy one flat and the Defendants would occupy the other.

22. The Defendants have craved leave to refer to and rely upon the documents in respect of the alleged business jointly carried on by the Plaintiff and the Defendants. At the hearing before me, there was not a single document which indicate any business jointly carried on by the Plaintiff and Defendant No.1. It was stated that at the trial the Defendants would establish their case. That however is not a sufficient answer or a defence at the interlocutory stage. Nor was my attention invited to any evidence which establishes that the suit flats had been acquired from the money belonging to the alleged joint businesses.

23. Mr.Chaurasia relied upon the alleged balance sheet of Defendant No.1 for the year 1986-1987. The balance sheet is not only of no assistance to Defendant No.1 but in fact militates against his case. There is a reference on the assets side of the balance

sheet under the heading "amounts due from" to amounts allegedly due by M/s.Novel Products and Novel Industries of Rs.30,000/- and Rs.37,000/- respectively aggregating to Rs.67,000/-.

. This balance sheet in fact supports the Plaintiff’s case in paragraph 20 of the plaint, wherein he states that he had started business as a sole proprietor of the firm namely M/s.Novel Produces. The said firm was converted into a private limited company in the name of M/s.Novel Thermoplast Pvt.Ltd. The Plaintiff has further stated that Defendant No.1 was neither a Director nor a shareholder of the said Company. Indeed the fact that an amount of Rs.67,000/- is due to Defendant No.1 from M/s.Novel Products would show that M/s.Novel Products was independent of Defendant No.1. That is why M/s.Novel Produces is shown as a debtor in the Defendant’s balance sheet.

. It was contended that the first Defendant was a partner in M/s.Novel Products. There is nothing on record which indicates any such thing. Despite repeated requests, there is not a scrap of evidence produced which establishes any such partnership between the Plaintiff and Defendant No.1. Admittedly,

no such firm is registered with the Registrar of Firms under the Indian Partnership Act, 1932.

24. The first Defendant's case therefore that the suit flats were purchased from the funds of the business jointly carried on between the Plaintiff and Defendant No.1 is, to say the least, not established. In fact the case appears to be wholly unfounded.

25. Thus there is no evidence showing any interest whatsoever of Defendant No.1 in the suit flat. In fact, the evidence relied upon by Defendant No.1 indicates the contrary.

26. The constant refrain on behalf of the Defendants was that the case pleaded in the written statement would be proved at the trial and that it was not necessary to establish the same at the interlocutory stage.I do not agree.

27. It was further submitted that the Defendants are admittedly in use and occupation of flat No.1502 and therefore at the interlocutory stage the Court ought not to dispossess them either by appointing a Court Receiver or otherwise. Despite more than just a strong prima-facie case being made out by the

Plaintiff, I am not inclined to dispossess the Defendants with respect to the entire flat at this stage. Despite the aforesaid findings, I am not inclined to grant reliefs in respect of two rooms in respect whereof the Defendants were admittedly gratuitous licensee in view of the judgment of the Full Bench of this Court in the case of - *P.D. Kotech and another vs. Smt.M.J. Damodar & others, dated 10.7.2007.* This however, is without prejudice to the rights of the Plaintiff to adopt proceedings in accordance with law for the said two rooms as well.

. However, the rival contentions regarding possession of the remaining part of the suit flat requires to be considered.

28. I am inclined to accept the Plaintiff’s case as stated above, that from inception he had merely permitted his brothers to occupy one room each purely gratuitously. I am further inclined to accept the Plaintiff’s case that he had at all times used the hall as his office and to keep and store his material. I also find considerable substance in the Plaintiff’s case that he has used one of the rooms for installing the equipment required for physiotherapy. The Plaintiff has also fairly stated that after Vijay

vacated the suit flat on acquiring another flat in the same building, the Defendants started occupying the room occupied by said Vijay.

29. According to the Plaintiff, the Defendants forcibly removed all his machineries and articles lying in the hall and kept them in the open space outside the suit flat. The Plaintiff thereupon made a complaint dated 15.3.2005 to the police who merely directed him to adopt proceedings in a Civil Court.

30. The Plaintiff’s case is that thereafter the matter was sought to be resolved with the intervention of mediators.

31. It is pertinent to note that on 18.3.2005, Defendant No.1 also filed a police complaint in which he alleged that he had given the Plaintiff Rs.18,00,000/- by selling his flat at Andheri and that therefore the Plaintiff "had given his own flat to reside temporarily". There is no allegation sought to be raised before me or in the written statement namely that the suit flat was purchased from the joint family business. Defendant No.1 also averred that he was permitted to reside in the suit flat by the Plaintiff only temporarily. Mr.Chaurasia submitted that the

Defendants had deposited a sum of Rs.18,00,000/- with the Plaintiff. The said sum of Rs.18,00,000/- were the sale proceeds of one of the properties owned by Defendant No.1. I will assume that there is a dispute regarding the same. I will assume that there are several other disputes between the parties. The same are however not relevant to this suit. The Defendants are always at liberty to adopt proceedings in accordance with law for recovery of the said amounts.

32. Considering the sequence of the events, it appears that the Plaintiff was dispossessed pursuant to the Defendants' decision to file a suit which they did on 30.3.2005.

33. Defendant No.1 filed the said suit in the Bombay City Civil Court thereafter on 30.3.2005. Prima-facie it appears that the suit was filed to cover up dispossession by Defendant No.1 of the Plaintiff. The allegation that the Plaintiff tried to assault the Defendants is prima-facie unfounded. There is nothing to suggest or support the same.

34. In the circumstances, in my view while it is true and indeed is fairly admitted by the Plaintiff that Defendant No.1 had been permitted to use

initially one room and thereafter both bedrooms by the Plaintiff, I find considerable force in the Plaintiff's contention that he always used the said hall.

35. In the facts and circumstances, it is not at all desirable that I permit the Defendants even to use the said hall in common with the Plaintiff. This is in view of the allegation from both the sides and the police complaints.

36. A floor plan of the suit flat has been tendered, the same is taken on record and marked "X" for identification. In the facts of this case, it would be desirable if instead of permitting the Plaintiff to use the living room, he is permitted to use bedroom No.2. This is in fact in the interest of both the Plaintiff and the Defendants as well. The Defendants could then have use of the living room with the Plaintiff being permitted to use the same only for the purposes of ingress and egress from bedroom No.2. If the Plaintiff is allowed to use the living room, the Defendants would but naturally be constantly using the living room for accessing the flat as well as for moving from one room to other. Moreover, bedroom No.2, does not even have an attached bathroom. Thus

no additional advantage would be given to the Plaintiff by his being permitted to use bedroom No.2 instead of the living room. On the other hand, considering the physical disability of the Plaintiff, it is desirable that he should get some privacy. This can be secured by permitting him to use bedroom No.2 instead of the living room.

37. Both the Notices of Motions are disposed of by the following order :-

i) The Defendants shall be permitted to use bedroom No.1 and the hall in the suit flat and kitchen exclusively. The Plaintiff shall be entitled to use bedroom No.2 in the suit flat exclusively. The Plaintiff shall be entitled to joint use of the common toilet with the Defendants. The Defendants shall use the suit flat only for residential purposes.

The Plaintiff shall be entitled to use the hall for the purposes to entering upon and exiting from the said bedroom No.2.

The Defendants shall be entitled to put up a

wooden partition in line with the passage wall and upto bedroom No.1, if they so desire. They shall further be entitled to keep all or any of rooms except bedroom No.2 under their lock and key.

A duplicate key to the entrance to the suit flat shall be provided to the Plaintiff.

ii) Liberty to the Plaintiff to adopt appropriate proceedings in respect of said two bedrooms. Refusal of any interim reliefs in this Notice of motion regarding the said two rooms shall not come in the way of the Plaintiff in such proceedings if adopted by the Plaintiff. Nor shall it affect the Plaintiff's right to any interim reliefs in such proceedings if adopted.

iii) Further the Notice of Motion is made absolute in terms of the order dated 10.1.2006 passed in Notice of Motion No.4054 of 2005 read with order dated 4.5.2007 in Notice of Motion No.1569 of 2007.

38. The operation of sub-para (i) above of this order

is stayed for a period of six weeks from today to enable the Defendants to challenge the same.